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ABSTRACT

Intended to help clarify issues surrounding the right of publicity (protection against the unauthorized commercial appropriation of a person's name, likeness, achievements or characteristics), this paper provides explanations of how the right developed, what it protects, how it has been applied in various jurisdictions around the country, and the issues raised by these decisions. The report also proposes guidelines to provide solutions for conflicting public policy issues. Following a brief introduction, posing some of the questions generated by the right of publicity, the report is divided into the following sections: (1) development of the right of publicity (historical development, public policy rationale, publicity's development from privacy, and public policy rationale for the right of publicity); (2) scope of the right of publicity (personal characteristics protected by the right, individuals protected by the right, duration of the right, and jurisdictional considerations); (3) the right of publicity's application in the media (news and newsworthy figures, literary works, movies and films, and live performances); (4) public policy conflict (First Amendment considerations, public interest, and conflict with copyright law); and (5) proposed right of publicity guidelines (public policy goals of proposed guidelines, descendibility guidelines, fair use guidelines, and protection guideline). The report concludes with a brief discussion of the impact of proposed right of publicity guidelines. The paper's 149 footnotes are appended. (HOD)

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FREE SPEECH vs. FREE ENTERPRISE:

The Public Policy Clash Between the First Amendment and the Right of Publicity

By:

Jan LeBlanc Wicks

Paper accepted for presentation to the Law Division of the Association for Education in Journalism and Mass Communication Convention, held at the University of Oklahoma in Norman, August 2 7, 1986.

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Introduction

The value of a celebrity endorsement has increased dramatically since 1961, when Arnold Palmer was paid $7,500 to promote L & M cigarettes. Now, Jimmy Connors earns between $2 and $4 million dollars a year for endorsing companies like Paine Webber, Inc. and Seiko Watches.[1] A celebrity's name and reputation is obviously worth a great deal of money.

The right of publicity developed to protect such valuable property. It protects against the unauthorized commercial appropriation of a person's name, likeness, achievements or characteristics.[2] Jimmy Connors trained and practiced for many years to develop into a world-class tennis player. The right of publicity insures that he will be rewarded for his efforts, protecting his right to decide when and how the "goodwill" value of his name will be used.

But a celebrity's control of his name and likeness may prevent the dissemination of information about him. Frank Sinatra filed suit against author Kitty Kelley, who is preparing an unauthorized biography about his life. Sinatra claimed that Kelley, during interviews conducted to gain information about the singer, had implied or stated that he authorized her to write the book. He is also asking for damages, as publication of Kelley's book will diminish the value of his unpublished 'authorized' biography. Sinatra asserts Kelley's book will infringe on his ability to economically benefit from his inside story. Kelley denied that she told any of her sources that the biography was authorized.[3]

Groups representing journalists and writers held a press conference to protest the filing of the suit. Representatives of the Reporters Committee for Freedom of the Press, the National Writer's Union, Washington Independent Writers and the American Society of Journalists and Authors said that Sinatra's suit "is an assault on Kelley's--and all writers'--constitutionally protected freedom of expression and should be dismissed on its face." They termed Sinatra's action "a chilling example of how a powerful public figure, using money and influence, can orchestrate what the public shall know about him."[4]

Elizabeth Taylor discouraged the American Broadcasting Company from producing an unauthorized movie about her life. When she discovered the network's intent, she filed suit in New York federal court, and said: "Someday I may write an autobiography or I may even do a film autobiography, and this is taking away from my income."[5]

The movie in question was a "docudrama," a television hybrid of fact and fiction that has evolved in recent years. Taylor's attorney, Allen Snyder asserted, "The networks have a right to report news in a truthful biography or documentary. But simply calling something a docudrama does not allow them to invent incidents, then mislead the public into believing this is the true life story of some celebrity." Arthur Miller, Harvard Law School professor and legal commentator for ABC's Good Morning America, disagrees. "The fact that a famous person can exploit his or her name and likeness doesn't necessarily mean that no one else can write about a person."[6]

Sinatra's and Taylor's lawsuits demonstrate a potential chilling effect upon portrayals of real people by the media. Producers may avoid portraying the famous in programs to avoid legal actions. Celebrities are threatening the media with lawsuits for portraying their lives, either to prevent the portrayals or to gain control over their content. "Many portrayals are a part of elaborately produced motion pictures, television dramas, or stage presentations, involving financiers, distributors, exhibitors, and other diverse participants. Because a successful suit can result in substantial damages, or even an injunction against continued presentation of a production that may have cost millions of dollars, there is a natural unwillingness to assume these risks in questionable cases."[7]

Yet society is interested in the famous; otherwise, these portrayals would not be considered. And therein lies the public policy clash: 'free speech' vs. 'free enterprise.' Artists and creators are encouraged by society to create works of interest and usefulness. Copyright law protects those interests to reward and encourage further efforts. The right of publicity does the same for public figures.

However, the right of publicity enabled Elizabeth Taylor to prevent the dissemination of information about her life. It effectively gave her censorship power over her portrayal--the power of prior restraint. Are we to assume that a celebrity's right to benefit financially from the use of her name and likeness is more important than public policy established by the First Amendment?

Many important questions about the right remain unanswered, since there is no federal policy regarding its application. Court decisions in various jurisdictions throughout the country have provided guidelines for those regions, but no real national guidelines exist. In addition, the interpretation of the right varies from jurisdiction to jurisdiction and judge to judge. Clarification of the right and its application is necessary to provide judges with consistent guidelines for national use in interpreting cases, and to make the news and entertainment media aware of their rights when reporting on or portraying public figures.

To assist in this clarification, the author intends to provide an explanation of how the right developed, what it protects, how it has been applied in various jurisdictions around the country, and the issues raised by these decisions. Proposed guidelines will be presented to provide solutions for the conflicting public policy issues, hopefully to the satisfaction of public figures, society, and news and entertainment organizations.

Development of the Right of Publicity

How did celebrities gain the potential to control their names and likenesses to such a degree? The history of the right's development provides illumination.

A. Historical Development in Privacy

The right of publicity originated in privacy. Ironically, the right of privacy developed in the late nineteenth century, in response to the press' vigorous coverage of the private lives of prominent individuals. Samuel Warren and Louis Brandeis authored an article that appeared in the Harvard Law Review in 1890, arguing for a right of privacy, for the right of an individual to be "let alone."[8]

The right developed judicially in response to the public's outrage resulting from the 1902 Roberson v. Rochester Folding-Box Company case, where the defendant used a young lady's likeness to advertise its product without her consent. The New York Court of Appeals denied the right to protection from such a use of likeness, due to a lack of precedent.[9] The public disagreed, and soon after the New York legislature passed a law making it a misdemeanor to make use of a person's name, portrait or picture for advertising purposes or the purposes of trade.[10]

Three years later, in the Georgia Supreme Court, a similar case was decided. In Pavesich v. New England Life Ins. Co., the defendant insurance company used the plaintiff's name and picture, and implied that Pavesich purchased an insurance policy from the company, even though he had not. Drawing from the Warren and Brandeis article, and the events in New York, the court recognized the existence of a distinct right of privacy under common law. Pavesich became the leading case in the privacy area.[11]

The Pavesich court described privacy as the right to enjoy one's life in the way one found most agreeable, according to personal temperament, provided that in so enjoying the rights of another are not invaded.[12] And the right gave an individual confidence in that enjoyment. "Security of person is as necessary as the security of property, and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection."[13]

In contemporary law, privacy is composed of four different kinds of personal invasion: appropriation, intrusion upon seclusion, public disclosure of embarrassing private facts, and false light in the public eye. Appropriation is defined as the taking of one's name or likeness for another's economic benefit or advantage. It is a person's name as a symbol of his identity that is involved, and not simply the name.[14] "The effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trademark in his likeness."[15] Publicity rights developed from this tort.

Intrusion is an invasion of a person's physical solitude or seclusion by invading one's home or illegally searching a person. It also has been extended to eavesdropping by wiretapping and other means. There must be an element of prying or intrusion, and an individual has no legal right to be let alone in a public place.[16]

The public disclosure of private facts involves objectionable publicity given to private information about a person, even though it is true. The disclosure must be a public disclosure, and the facts disclosed to the public must be private facts. Such facts might be publicity given to someone's debts, medical pictures of a person's intimate anatomy, and embarrassing details of a person's characteristics or behavior.[17] In addition, the matter made public must be one which would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities." However, "the law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze."[18]

The fourth tort of invasion of privacy concerns publicity which places a person in a false light in the public eye. False light privacy cases are based upon false statements of fact, such as falsely attributing authorship of an article to a person, or using one's name on a petition without permission. The false light is not necessarily defamatory, but it must be something that a reasonable person would object to.[19]

B. Public Policy Rationale of Privacy

The right of privacy represents the public policy aim of respecting a person's autonomy, the right to be let alone. The right is personal, and does not extend to others, unless their privacy is invaded as well. The right is not assignable, and does not survive after a person dies.[20]

In recent years, a person's 'zone of privacy' has been extended from the common law to include a constitutional right to engage in certain highly personal activities. "More specifically, it currently relates to certain rights of freedom of choice in marital, sexual, and reproductive matters."[21]

The basic injury protected against by the right of privacy is a violation of the plaintiff's right to be left alone, and the essential injury is to one's feelings. It is a person's "inviolate personality" which is harmed, and the right is a means of protecting thoughts and feelings about oneself. It provides a remedy for the mental anguish caused when there is no tangible injury to property or contract rights.[22] Basically, it provides society's members with the assurance that their 'peace of mind' is protected.

C. Publicity's Development From Privacy

A distinction between private and public persons began to emerge in privacy appropriation cases. Although the plaintiff's feelings were protected under the right of privacy, any economic harm occurring due to an appropriation was not necessarily recoverable.[23] In addition, privacy on its face is the reverse of what the right of publicity seeks to protect. Privacy protects the right to be let alone. But, "many prominent persons, far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."[24]

The differing legal needs of private persons and public figures led to the development of the right of publicity. Analogously, in libel law, public figures have a different legal status than private citizens since they have greater access to the media. Access gives them a realistic opportunity to present their views to the public, as Elizabeth Taylor did when announcing her 'docudrama' suit to the media. Private individuals do not have such an advantage, and are therefore more vulnerable to injury through disclosure of private information in the media. The interest in protecting their privacy rights is therefore greater.[25]

Under libel law, public figures are defined as: "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures."[26] The libel definition seems appropriate for the right of publicity as well.

The right of publicity emerged to protect the economic harm proven unrecoverable under appropriation. A case which brought this distinction to light was O'Brien v. Pabst Sales Co., which concerned an action by a famous football player against a beer company for invading his right of privacy by publishing his photograph on a football calendar containing beer advertising. The Fifth Circuit Court of Appeals held that O'Brien had waived his right of privacy by consenting to widespread publicity about his football exploits, and that no injury had been shown. The dissenting judge, Judge Holmes, argued that the appellant was entitled to recover the reasonable value of the use of his

picture for advertising purposes. He asserted there were great property rights created by "the demands of modern methods of advertising of comparatively recent origin." In his view, it was common practice for advertisers to pay for the right to use the name and likeness of a famous person.[27]

Judge Holmes said: "The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal value; but it is a personal right, which may not be violated with impunity."[28]

In Haelan Laboratories Inc. v. Topps Chewing Gum Inc., the right of a person to protect his publicity value was first explicitly recognized and designated as the "right of publicity."[29] The case was a dispute between two chewing-gum manufacturers over the use of a baseball player's photograph in connection with the sale of the gum. The U. S. Court of Appeals, Second Circuit, disagreed with the defendant Topps' contention that a person has no legal interest in the publication of his picture other than his right of privacy. The court said, "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture...This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."[30]

The new right was delineated by Melville Nimmer in a 1954 article in Law and Contemporary Problems. Nimmer explained that privacy evolved as a means of preventing offensive publicity. But, in most instances, public figures who have a publicity value in the use of their names or likeness cannot claim that they are offended by their use before the public.[31]

Nimmer argued that the right of publicity should be recognized as a property right, not a personal right. It should be assignable to others, and enforceable by the assignee(s). Appropriation of the right should be actionable whether or not the publicity was offensive to the celebrity's sensibilities. In his view, the use would usually be non-offensive, since such a use is often more valuable to the defendant as well as the plaintiff.[32]

Nimmer found one exception to the right of publicity. "Where use of a person's name, photograph, or likeness is made in the dissemination of news or in a manner required by the public interest, that person should not be able to complain of the infringement of his right of publicity...It may be argued that since publicity values are useful mainly in connection with trade and advertising, this presents a convenient place to draw the line between wrongful infringement of the right of publicity and proper exercise of freedom of expression."[33]

Nimmer's clear intent was muddied by the U. S. Supreme Court in Zacchini v. Scripps Howard, a case involving the unauthorized broadcast of a cannonball artist's entire two minute act. Zacchini agreed that his performance was a newsworthy event, but argued that broadcasting it without his consent was an unlawful appropriation of his professional property, according to Ohio state law. The Court agreed: "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[34] The Court left the drawing of that line to the states.

D. Public Policy Rationale for the Right of Publicity

The Zacchini case provided the public policy rationale for the right of publicity. First, a state's rationale for protecting the right is preventing unjust enrichment by the theft of goodwill. "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[35]

The state's interest also includes more than a desire to compensate the performer for time and effort invested in the act: "The protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public."[36]

An added benefit accrues from this protection and support. The right may encourage "principled persons to enter publicity-generating professions by removing two major drawbacks:

lack of control over unfettered appropriation of one's name and likeness, and the resulting loss of personal integrity."[37] "The right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful conduct: unjust enrichment and deceptive trade practices."[38]

These state interests are consistent with the federal public policy of "promoting the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[39] The Supreme Court expressed this policy in Mazer v. Stein, a case involving the unauthorized use of one manufacturer's copyrighted statuette as a lamp base by a competing lamp manufacturer. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[40]

The Court expressed a similar idea in Washingtonian Co. v. Pearson, allowing the petitioner to sue for copyright infringement, even though the petitioner had neglected to comply with registration requirements until after the copyright infringement occurred. The Court said that the Copyright Act was intended to grant valuable rights to creators without imposing burdensome requirements, "to afford greater encouragement to the production of literary works of lasting benefit to the world."[41]

Scope of the Right of Publicity

A. Personal Characteristics Protected by the Right

The right of publicity protects a celebrity's creative efforts and economic interests in his name and likeness to some degree. In a general sense the right has grown to encompass more than just these two elements of a celebrity's persona since its inception.

Celebrities or their assignees have sought to protect various aspects of their public selves, including name,[42] likeness,[43] public personality,[44] original characters they've created on their own,[45] or with the assistance of their employer,[46] their voice,[47] or other personal attributes, such as one's distinctive automobile.[48] It appears that any unique or distinctive aspect of a celebrity's public personality is protected in most cases, and any characters the celebrity has created are usually protected, as long as someone else does not own the rights to that character.[49]

B. Individuals Protected by the Right

The question of who may invoke the right is less clear. "Clear examples of celebrities include politicians, movie stars, recording artists, and other entertainers,"[50] and "any person achieving fame in any walk of life could obtain a right of publicity by licensing the use of his name or likeness in connection with any collateral product."[51]

It is not clear how 'famous' one must be to achieve celebrity status,[52] but it is evident from many cases that it may require years,[53] or even a lifetime of effort,[54] or may occur by accident. It has been advanced that it is impractical to attempt to decide who has achieved celebrity status. One commentator argued that every person should have the property right of publicity, with any damages claimed to depend upon the degree of notoriety attained by the plaintiff.[55]

C. Duration of the Right

Once publicity protection is established, courts have had to decide whether or not others can inherit it. Descendibility varies by jurisdiction, and most decisions in this area seem to fall within two main categories.

Either the right dies with the celebrity,[56] or is passed on to heirs.[57] Within this second category, whether or not the right will be inherited usually depends upon whether the celebrity exploited the right during life.[58] It has also been argued that the right of publicity should expire fifty years after a celebrity's demise, to make the right consistent with copyright law.[59]

Another question arises as to how long an individual remains a public figure. If a famous person returns to private life, should celebrity status be lost? No clear answer has been provided by the courts.

D. Jurisdictional Considerations

Since 1953, when the U. S. Court of Appeals, Second Circuit, first established the right of publicity as a matter of New York common law,[60] its scope has grown to include other aspects of a celebrity besides name and likeness. However, this growth has not been consistent in all jurisdictions, since the only suit to reach the Supreme Court dealt with a case of limited application.[61] "The precedential value of the decision is, therefore, limited to extreme cases of infringement."[62]

When considering the right of publicity's application, one must be aware of differences found in various parts of the country. For example, in U. S. District Court, Southern District of New York;[63] U. S. District Court, District of New Jersey;[64] the Tennessee Chancery Court, Davidson County;[65] and the U. S. Court of Appeals, Second Circuit,[66] the right of publicity was considered descendible.

On the other hand, the right to exploit name and likeness is the artist's alone and must be exploited during one's lifetime, if at all, in California[67] and Georgia.[68]

The Right of Publicity's Application in the Media

Court decisions throughout the country have examined the right of publicity in light of the freedom of expression. In each case, a famous person or licensee sought compensation for an unauthorized use of the plaintiff's name or likeness. Plaintiffs' success or failure often rested on whether or not the judge found the content of the use to be of value to society. These cases will be considered as a whole, for the sake of

argument, although they have no national precedential value in reality. Certain rules of law have developed regarding newsworthiness, literary works, movies, and live performances to provide guidelines for what is protected expression and what is not.

A. News and Newsworthy Figures

Certain cases taken as a whole provide guidelines for balancing the right of publicity against the First Amendment. Paulsen v. Personality Posters, Inc. concerned a privacy action by Pat Paulsen, to prevent the defendant from marketing a poster featuring the entertainer as a "mock candidate" for president. The Supreme Court, Special Term, New York County, said the privacy statute was not intended to limit the dissemination of information on matters of public interest. "...It was early held that newspapers, magazines, and newsreels are exempt from the statutory injunction when using a name or picture in connection with an item of news or one that is newsworthy." The court added that the scope of subject matter considered newsworthy has traditionally been defined in "most liberal and far reaching terms."[69]

In addition, "...a public figure or personality, by the very nature and character of such status, evokes public interest in his doings and that his activities are generally speaking always 'news'."[70]

Extending its analysis from privacy, the court said, "...even where the 'right of publicity' is recognized, it does not invest a prominent person with the right to exploit

financially every public use of name or picture. What is made actionable is the unauthorized use for advertising purposes in connection with the sale of a commodity. The 'right of publicity,' therefore, like that of 'privacy' is at best a limited one, within the context of an advertising use, and would be held to have no application where the use of name or picture, as is here the case, is in connection with a matter of public interest."[71]

However, what constitutes 'a matter of public interest' is somewhat unclear. In Factors, Etc., v. Pro Arts, Inc., the U. S. Court of Appeals, Second Circuit, considered whether publication of a poster of Elvis Presley offered for sale three days after the entertainer's death was indeed privileged. The court decided: "We cannot accept Pro Arts' contention that the legend 'In Memory...,' placed its poster in the same category as one picturing a presidential candidate (Paulsen), albeit a mock candidate. We hold, therefore, that Pro Arts' poster of Presley was not privileged as celebrating a newsworthy event."[72]

Consequently Factors, which purchased the exclusive license to exploit Elvis' name and likeness two days after his death, was able to enjoin Pro Arts from selling its poster. Pro Arts had purchased the copyright in the photograph of Presley it was using from a staff photographer of the Atlanta (Georgia) Journal. So even though Pro Arts owned the copyright of the photo it was using, Factors could still prevent the use.[73]

Paulsen implied nearly absolute protection for First Amendment rights when balanced against the right of publicity. Factors, Etc. implied that this absolute protection applies to political issues only. Zacchini may have actually limited it, since the U. S. Supreme Court left clarification of the line between a protected and appropriated use to the states.[74]

The holding in Zacchini is somewhat inconsistent with copyright law. Keep Thomson, Etc. v. Citizens For Gallen Comm., involved a dispute between two gubernatorial campaign committees over the use of a song. Copyright to the song was purchased by Thomson's committee. The defendants used fifteen seconds of the song in a political advertisement, and argued that it was a 'fair use' under copyright law.[75] Copyright law grants to the owner of a copyright the exclusive right of reproduction and of the preparation of derivative works based on the copyrighted works, including sound recordings. However, it also permits the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Any such 'fair use' is not an infringement.[76]

The U. S. District Court, District of New Hampshire, found that the Gallen Committee's use was fair, and said: "...the exclusive right of a copyright holder must be weighed against the public's interest in dissemination of information affecting areas of universal concern. Conflicts between interests protected by the First Amendment and the copyright laws can be resolved by the application of the fair use doctrine."[77] Protection has been extended to fair use in entertainment as well.[78]

However, protection for public issues may have been limited in a recent U. S. Supreme Court decision. The case, Harper & Row v. The Nation, involved the defendant's use of portions of the soon to-be-published memoirs of former President Gerald Ford in an article. It 'scooped' Harper & Row, which had contracted exclusively with Time magazine to publish portions of the upcoming manuscript, by using 300 words taken directly from the manuscript before its publication. Time then canceled the contract, refusing to pay the remaining $12,500 due. Harper & Row sued.[79]

The Court said, "The Nation had every right to seek to be the first to publish information. But The Nation went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a 'news event' out of its unauthorized first publication of a noted figure's copyrighted expression."[80]

The Court imposed a narrow limitation upon 'fair use' in its decision, holding that fair use did not protect an infringer when the infringer preempted an author's right to decide when and where the work would first be published, and when it caused economic harm. "Therefore, the decision might mean only that reporters risk violating the copyright laws if they take passages wholesale from unpublished works without authorization."[81] The decision seems similar to Zacchini as it concerns an extreme instance with little precedential value.

In general, the right of publicity is not intended to limit the dissemination of news or information concerning matters of public interest. Its intent is to protect the economic interests of creators. However, a journalist may not be able to clearly determine how much of a performer's act may be used in a news story, resulting in a 'chilling effect' of such a use.

A 'chilling effect' occurs "when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity."[82] The original explication of the right noted that when it was used in connection with the dissemination of news or in a manner required by the public interest, a celebrity should not be able to complain of an infringement.[83] The actions of Frank Sinatra and Elizabeth Taylor demonstrate that this may no longer be true. Journalists and artists must now consider the possibility of being sued if they choose to disseminate information about a celebrity.

B. Literary Works

Several cases appear to represent what for argument purposes could be construed as general guidelines for novelists or biographers, even though they were decided in different jurisdictions and are not applicable nationwide. In Spahn v. Julian Messner, Inc., Warren Spahn, a famous baseball player, sued a biographer who had included fictional dialogue, incidents, thoughts, and feelings in his portrayal of Spahn.[84] The biography apparently did not make it clear that the dialogue and thoughts attributed to Spahn were fictionalized.[85]

Although Spahn was a privacy action, it implied application of the right of publicity. The New York Court of Appeals said that upholding this knowing fictionalization "would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual's right--albeit a limited one in the case of a public figure--to be free of the commercial exploitation of his name and personality."[86]

The fictionalization issue was examined in another case, Hicks v. Casablanca Records, where a novel and movie about an actual incident in Agatha Christie's life was clearly labeled as fictitious.[87] The U. S. District Court, Southern District of New York, found that "...the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."[88] In other words, in Spahn, the defendant intended to deceive the public; in Hicks, the defendant did not.

One commentator noted, "Hicks limits Spahn by allowing right of publicity actions only in cases where fictionalizations are presented as fact rather than fiction. Absent deliberate falsifications or attempts to confuse the public, the First Amendment protection of free expression outweighs the asserted right of publicity in literary work cases."[89]

In Frosch v. Grossett & Dunlap, the New York Supreme Court, New York County, considered the assertion that a book written by Norman Mailer about Marilyn Monroe was not a biography, but a "product put together for sale and profit in book form to effect a conversion and wrongful exploitation and appropriation of the rights of publicity possessed by decedent and now her estate."[90] The court found the claim of wrongful exploitation was barred by the First Amendment, and that even though the book might contain imaginary dialogue, it was clearly an account of Monroe's life.[91]

On appeal, the New York Supreme Court, Appellate Division, First Department held, "We think it does not matter whether the book is properly described as a biography, a fictional biography, or any other kind of literary work. It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services. The protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person."[92] Therefore, unless a literary work is a disguised advertisement or misleads the public as to its true nature, its expression will be protected (in New York).

C. Movies and Films

As discussed earlier, fictionalization of true incidents in a public figure's life are protected. A movie portraying a fictionalized, eleven-day disappearance in Agatha Christie's life was afforded First Amendment protection, even though it portrayed her as an emotionally unstable woman who engaged in a sinister plot to murder her husband's mistress.[93] According to the court, since there were no countervailing legal or policy reasons to balance against First Amendment interests, the movie and novel should be protected.[94]

In Guglielmi v. Spelling-Goldberg Productions, actor Rudolph Valentino's nephew asserted that a movie made about his uncle's life was not entitled to First Amendment protection since it incorporated Valentino's likeness in a work of fiction for financial gain, and falsely portrayed the deceased star.[95] In considering the financial gain aspect of the appellant's arguments, the court said that the decision of whether or not to use a celebrity in a movie must be left to its creators. "Courts would be required not merely to determine whether there is some minimal relationship between the expression and the celebrity, but to compel the author to justify the use of the celebrity's identity...Such a course would inevitably chill the exercise of free speech--limiting not only the manner and form of expression but the interchange of ideas as well."[96]

The court added that fiction writers might be able to express themselves more accurately by weaving into a tale persons or events familiar to their readers. "No author should

be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment."[97]

A privacy and defamation action concerning the portrayals of living public figures, Cohn v. NBC, examined if use of the plaintiffs's names and use of actors to represent them in a movie about the late Senator Joseph McCarthy were warranted. Roy Cohn and David Schine, former McCarthy aides, claimed that the use of their names against their wishes constituted an invasion of privacy. The court dismissed the suit, finding that Cohn and Schine were both clearly public figures and the subject matter of the film of genuine public interest.[98]

Although this was a privacy and not a publicity action, it demonstrates that public interest considerations are important whether the public figure is living or dead. The court decided the plaintiffs remained public figures despite their return to private life.[99]

Therefore, it is arguable that living and deceased public figures can be the subjects of films despite the protection afforded to them under the right of publicity. If a film is found to be a matter of public interest, and no showing of actual malice[100] is made, expression should be protected. Yet, as evidenced by Elizabeth Taylor's action, prior restraint of protected expression may increase as a result of publicity rights.

D. Live Performances

Decisions regarding live performances have not been consistent with the opinions rendered in newsworthiness, literary works, and film cases. In Estate of Presley v. Russen, the U. S. District Court, District of New Jersey, ruled that a stage production entitled "The Big El Show," patterned after an Elvis Presley concert, was predominantly designed to commercially exploit Presley's likeness without contributing anything of value to society.[101] Since the production was an exploitive use and did not disseminate information or contribute to society's cultural enrichment, it was not entitled to First Amendment protection, the court said.[102]

The court discussed the production's lack of creativity. Since Russen did not depict Presley in new situations, and simply imitated him, there was not enough new creative content. Viewed in another fashion, creative content could comprise Russen's impersonation, since considerable time and effort must have gone into his attempt to portray Presley in a fashion authentic enough to attract paying customers.

The Russen court maintained that the purpose and function of entertainment must be scrutinized in determining the scope of the right of publicity.[103] If use of the celebrity's name or likeness is largely for commercial purposes, the right of publicity should prevail over First Amendment considerations.[104] Ticket sales to a live presentation must then be truly different from book sales, in the court's view, even though both are 'selling' a form of information concerning a celebrity.

Groucho Marx Productions, Inc. v. Day & Night Co., involved the use of the Marx Brothers characters in a play intending satiric comment on Hollywood movies, using a parody of the characters as one of the literary devices. The defendants indicated that they placed the Marx Brothers in a new situation with original lines, and thereby were not simply imitating them. The court did not agree, and advanced that literary commentary may have been the intent of the playwright, but any such intent was overshadowed in the play itself by the wholesale appropriation of the Marx Brothers characters.[105]

"In this case, like the Presley case, the defendants have not rebroadcast Marx Brothers acts but have reproduced their manner of performances by imitating their style and appearance. The play at issue is not biographical nor can it be viewed as an attempt to convey information about the Marx Brothers themselves or about the development of their characters."[106]

The play, in the court's view, was a misappropriation of the Marx Brothers characters for commercial purposes and, therefore, outside First Amendment protection.[107] Once again, commercial intent considerations superseded First Amendment ones, and the 'interpretive' form of biographical information was found to be less worthy of protection than the written form.

"Society therefore, is left free to draw inspiration from the mountains, but is denied the 'stars'."[108]

Public Policy Conflict

A. First Amendment Considerations

The right of publicity encourages creative effort and protects against unjust enrichment. "However, any consideration afforded the fruits of one's labors must be examined in light of any important countervailing public policy considerations."[109]

The countervailing consideration is the First Amendment, which encourages free expression and the development of a 'marketplace of ideas' in society. Free speech, among other purposes, enhances individual development and self-realization, through the consideration of diverse views, and information.[110]

Since freedom of expression is considered a fundamental right in our society, the suppression of information should be discouraged. And since expression is so important, society should therefore 'err' in its favor by minimizing the possibility of censorship at the expense of other considerations.

One commentator explained: "The chilling effect is premised upon the recognition of the first amendment as a preferred value. More than just an emotive observation, this recognition provides the analytical foundation for dealing with a legal system characterized by uncertainty. Admitting the inevitability of error, and expressing our preference for errors made in favor of free speech, we are forced to design rules and procedures that minimize the occurrence of the more harmful error, i.e., the wrongful suppression of speech.[111]

Publicity rights have proven to be inconsistent with this public policy ideal. Justice Powell, in his dissenting opinion in Zacchini, said: "The Court's holding that the station's ordinary news report may give rise to substantial liability has disturbing implications, for the decision could lead to a degree of media self censorship. Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an 'entire act,' he may decline coverage--even of clearly newsworthy events--or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster."[112]

The Zacchini case represents an 'exception' to First Amendment protection. An 'exception' now exists in copyright law as well, considering the recently-decided Harper & Row case.

It is questionable whether, in either case, the plaintiff's profit-making ability was severely harmed. It is arguable that viewing Zacchini's act may have aroused public interest to see it in person. Similarly, Justice Brennan, in his dissent in Harper & Row, said: "The Court holds that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance--the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting 'the economic incentive to create and disseminate

ideas...,' this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture."[113]

It seems that publishing such a small portion of a manuscript cannot exhaust curiosity in it, nor prevent purchase. In addition, it is arguable whether $12,500 is a substantial economic loss to Harper & Row. The Court seems to favor 'free enterprise' rather than free expression, and places the right of the author paramount to society's right to the free flow of information.

Decisions concerning literary works, films, and live performances have not been consistent in terms of commercial intent. Unless a literary work is a disguised advertisement or misleads the public as to its true nature, a writer should be protected when using a deceased celebrity. Moviemakers are fairly secure in including a deceased celebrity in a movie, since this decision does not have to be justified on the basis of commercial intent. Yet a live performer cannot portray the Marx Brothers or Elvis Presley with the same certainty.

It does not matter that there is sufficient public interest in live portrayals. The artistic quality of the performance is not a consideration, since entertainment that merely imitates "even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment."[114] The artistic talent required to do a skillful imitation is not considered as valuable a form of expression and usually goes unprotected. A puzzling conclusion,

as the First Amendment generally prohibits content based regulation of speech.[115] It seems that the burden of proof should rest with the subject of the portrayal, not the portrayer.

In Estate of Presley v. Russen, imitation was not held to have social or informational value.[116] One set of commentators has defined imitation as "primarily an attempt to duplicate the characteristics of another, either to delude the public or to compensate for an absence of creative effort."[117] It appears unlikely that the public was unaware of the fact that defendant Russen was not actually Presley, since the singer was deceased.

In terms of compensating for lack of creative effort, perhaps it depends on what one classifies as such. A great deal of time and effort must have gone into the 'recreation' of Elvis Presley. Practice, coupled with skill and talent, completed the transformation. In addition, any historically accurate presentation of Elvis seems to require use of his songs and words.

One commentator noted: "Since Presley's death, the public's experience is limited to imitations of Presley. Overprotecting publicity rights may deprive the public of this experience by denying commercial appropriators the opportunity to create new forms of entertainment based on established public interest."[118]

The public seems to be the loser in some right of publicity cases. Even though enough people were willing to pay to see Russen's impersonation of Presley to enable him to make a living doing it, the court decided it had no social value. In this

instance, the right of publicity discouraged rather than rewarded 'creative effort of value to the public,' and totally disregarded the public's wishes.

Parody may be defined as making use of another's attributes for humor and commentary as part of a larger presentation, in which a considerable amount of the content is provided by the parodist.[119] The Marx court decided that "A Day in Hollywood, A Night in the Ukraine," was not a parody, since it did not contain enough original material and "successfully reproduced the Marx Brother's own style of humor."[120] It did not matter that these characters were in an adaptation of a serious dramatic work -- Chekhov's The Bear -- into a Marx Brothers style comedy, and were only portrayed in the second act of the play.[121] One commentator noted: "The play was a parody; as such it did not substantially harm the holders of the comedians' publicity rights. 'A Day in Hollywood, A Night in the Ukraine' did not replace the Marx Brothers; it placed them in a new light."[122]

Courts are making decisions on live performances based upon their content. In both the Russen and Marx cases, "Rather than concentrating on the harm to the plaintiff's right of publicity, and determining whether this rose to the level of compelling concern, the courts attempted to measure the value of the speech at issue in each case. Assigning speech different values depending on its content was unnecessary and contrary to established First Amendment doctrine."[123]

B. Public Interest

Entertainment should enjoy equal First Amendment protection since it is a form of dissemination of information to the public. "Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire, science fiction or parable."[124]

The actual success or failure of a fictional vehicle, however, is up to the public. Society demonstrates how much it 'values' a vehicle by buying tickets to a hit movie, watching a highly-rated television program, buying a new book by a best-selling author, or buying a ticket to see a popular actress in a play. If the public does not participate in sufficient numbers, no substantial 'reward' for creative effort is earned.

Society 'chooses' the content and manner of information it desires, and presumably dissemination of that information is to be protected without reference to its value.[125] Celebrities become famous because society pays to see their acts. "Fame is often fortuitous and fleeting. It always depends on the participation of the public in the creation of an image."[126]

Elvis Presley's popularity is based on the image he created for himself to appeal to the public. By buying his records and purchasing tickets to his movies, the public enabled Elvis to prosper and provide a comfortable future for his heirs. After he died, his heirs gained the right to decide when and where his name and likeness would be used, without any consideration for

those who helped create his fame and fortune. It is unfair when consideration of the public's contribution is ignored in right of publicity decisions, since the public plays an active part in the creation of that fame. Any public policy developed regarding the right arguably should consider the public's role.

C. Conflict With Copyright Law

Federal copyright policy is consistent with state interests concerning the right of publicity, since both encourage and protect creative effort. However, the copyright law extends protection to the expression of an idea, rather than the idea itself, and that protection is of limited duration.[127] Therefore, the works of an individual artist are protected, and the public interest is served since the idea may still be used by society.

Copyright and publicity conflict when artists use the personality or attributes of the famous in their acts. Under copyright law, such use is permitted and encouraged since works that draw upon reality are entitled to full copyright protection. Protection of creative works based on reality extends only to the author's individual expression. The idea/expression dichotomy leaves other creators free to make use of the underlying idea involved. The right of publicity removes the underlying basis of a person's expression from unrestricted use by creators, since celebrities' names and likenesses become their own protected property.[128] In other words, others may be barred from using the idea and the expression.

Proposed Right of Publicity Guidelines

A. Public Policy Goals of Proposed Guidelines

The need for clearer guidelines in the right of publicity area is obvious. If journalists and artists are uncertain of the legality of their actions, they may exclude the famous from their works. The public will be denied information that serves a useful purpose for society--a 'purpose' the public is willing to pay for.

Based on the issues and interests discussed in this paper, resolution of the public policy conflicts concerning the right of publicity should meet four aims:

1. Clarify application of the right in 'newsworthy' cases.
2. Insure uniform application of the right to all 'forms' of expression.
3. Protect a celebrity's economic interests without unduly restricting the dissemination of information.
4. Consider the public's contribution to a celebrity's ascendance to fame.

With these public policy aims in mind, three guidelines will be proposed.

B. Descendibility Guideline

Elvis Presley's interest in protecting the good will he developed in his name should certainly be protected. Yet those profiting from his good will in the Russen case were not responsible for its generation. "To give a person's heirs control over the exploitation of his attributes and his related publicity rights after his death will obviously not encourage

that person's (Elvis's) activities."[129] And in another commentator's view, "It is the celebrity, not his heirs, whose labors created the publicity value. If defendant has reaped where he has not sown, then so would the celebrity's heirs if they are entitled to collect royalties or damages for the use of their predecessor's name."[130]

"It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by the few. An equal distribution of the opportunity to use the name of the dead seems preferable. The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."[131]

The first proposed guideline would be that the right of publicity should end with a celebrity's death. During lifetime the celebrity receives tangible rewards for efforts. After death that earning potential should return to the public domain from whence it came, to be utilized by those who wish to invest the creative effort to do so. Both celebrities and the public are involved in the growth and development of fame. Besides compensating society for its role, the right of publicity should encourage individuals to make the effort to capitalize on that fame, as originally intended. By returning the right to the public domain, both celebrities' heirs and the public are encouraged to create.

Many valid arguments against this proposition can be raised. It may seem rather harsh to a celebrity's heirs. However, a celebrity could protect heirs through contractual and licensing agreements and other traditional property law methods prior to death. Heirs will most likely inherit a valuable estate as well.

Society should not be denied the right to attempt to utilize a celebrity's name simply because a celebrity was not prudent enough to look after heirs. Celebrities should worry about their heirs, not society.

C. Proposed Fair Use Guideline

"Copyright law mandates that the underlying basis of all creative expression remain in the public domain; the right of publicity declares that the physical fact of a person's appearance may be removed from the public domain."[132] Copyright law may provide a means to eliminate this difference and foster the use of more types of information in society.

Section 107 of the 1976 Copyright Act recognizes the principle that "the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[133] It is a defense to infringement, and allows other authors or creators to use a portion of a copyrighted work in the aforementioned circumstances. "Fair use is based on the express purpose of the copyright laws, 'to promote the progress of science and the useful arts.'"[134]

There are four factors to be considered when determining whether the use of a copyrighted work is fair:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

2. The nature of the copyrighted work;

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. The effect of the use upon the potential market for or value of the copyrighted work. [135]

The author argues that the 'fair use' doctrine should be adapted for use in right of publicity cases. Any use of a celebrity's name or likeness in a matter of public interest should constitute a 'fair use.' The proposal is designed to eliminate decisions based upon the value of expression, and shift emphasis to actual economic harm. "...Exploitative uses of a celebrity's persona such as movies, television programs, newspaper or magazine articles, news programs, books, or plays--all traditional modes of expression--should presumptively enjoy equal First Amendment protection."[136] More importantly, the proposal will make publicity rights consistent with established public policy.

Steven Hoffman, in his article in the Bulletin of the Copyright Society, entitled "Limitations on the Right of Publicity," discusses fair use as a limitation on the right of publicity. Hoffman argues that fair use would minimize conflict with economic, proprietary, and First Amendment rights. In addition, "...a fair use doctrine is appropriate because right of

publicity plaintiffs typically seek injunctive relief, and when a court sits in equity the fundamental issue before it is 'whether the acts complained of are fair or unfair'."[137]

Fair use requires consideration of actual economic harm. "To determine the validity of a fair use claim, the court examines the content of the copyrighted work and the context of its communication. Such assessment, however, does not evaluate the quality of the work, but rather determines whether its free use by the public would harm the author economically or would detract from the integrity of the work itself."[138]

Fair use applied to the right of publicity could be interpreted as follows:

When considering the purpose and character of the use, Hoffman suggests that the major distinction should be whether the celebrity's identity was used in a medium in which ideas are usually communicated, such as a book or movie, or whether the identity was used in commerce, as in connection with merchandise or in an advertisement. Expression, either of an informative or entertaining nature, should be protected by the First Amendment without judgment based upon content. Commercial uses, such as an unauthorized use of a celebrity's likeness for commercial advantage, may be prohibited.[139] A use in this context indicates actual economic harm, or an unfair practice.

In general, the distinction should work well. However, commercial uses should not be construed to include cases in which the use is newsworthy, such as Paulsen. As commercial speech has been granted First Amendment protection by the Supreme Court,[140] expression in a commercial environment may be protected in some instances.

The purpose and character of the use also incorporates elements of the Spahn case. If a use is intended to deceive the public as to its true nature, or constitutes unjust enrichment by theft of goodwill, then it should be actionable. Therefore, if a production company made a docudrama about Elizabeth Taylor's life, and it was clearly labeled as such, the expression should be protected.

When considering the nature of the copyrighted work, Hoffman argues that courts should consider the origin and nature of the celebrity's fame. In copyright law, the nature of a work is sometimes measured by the creativity and originality that the author has invested. On that basis, if an actor creates a character, as Charlie Chaplin invented "The Little Tramp," he should have greater rights in that character than another actor who merely plays a part without creating it.[141]

Consider that Chaplin invented the character himself, chose its distinguishing characteristics such as the top hat and cane, and developed a distinct personality for the character. In addition, the popularity of his own portrayal of 'The Little Tramp' endured for years. Therefore, an artist who creates,

portrays, and develops a character should have a greater publicity right in it than an individual who simply plays a character without creating it.

Another commentator advances that an actor who portrays a character created by his employer should retain publicity rights if his portrayal becomes identified with it. For example, Bela Lugosi has always been the consummate Count Dracula. A studio might own rights to the character itself, but the actor's portrayal constitute's an original contribution which contributed to the success of the film.[142]

Therefore, "In the right of publicity context, as in copyright, the policy interest of rewarding the fruits of labor is advanced by recognizing a joint right of publicity to an image like that of Count Dracula, which is the distinct result of the actor's unique features and the studio's unique and substantial enhancement of those features...This joint right would allow either party to market the image," and entitle both parties "to an accounting and a division of the proceeds for the use of the figure's image."[143]

Hoffman argues that the amount and substantiality of the use should be an issue of degree. He suggests a spectrum, which would protect the mere imitation of a celebrity without confusion that it is such at one end, but prohibit the unconsented commercial use of an entire act at the other.[144] The approach seems appropriate for uses in commerce, to determine the degree of appropriation. However, distinctions of this nature have created the murkiness that now exists in publicity cases.

The author argues that any use for news reporting, criticism, comment, scholarship, teaching or research, according to the limitations in the Copyright Act, should be allowed. When considering the amount and substance of the use, the emphasis should be on measuring what unfair advantage or profit has been obtained by the defendant through the celebrity's name or likeness, and if it was substantial, not on measuring how much of the celebrity's likeness has been appropriated.

If there is no unfair advantage or profit that causes substantial economic harm, the expression should be protected, thereby serving the public's interest. If a celebrity cannot prove any real harm, why should the public be denied information about a celebrity it helped to create? Considering the established public policy concerning the dissemination of information in copyright and free expression, the ideals embodied in those areas, and the public's participation in a celebrity's creation, a 'harmless' use of a celebrity's name or likeness must certainly carry more weight than the ability of a celebrity to make a profit. In a sense, Harper & Row's $12,500 loss or Zacchini's uncompensated appearance on a news program might be considered a form of 'repayment' to society for its contribution to their economic success.

Finally, the effect of a defendant's use on a celebrity's potential market would be considered. Hoffman suggests that the issues to consider are whether the plaintiff has exploited a name or likeness so as to create a market in publicity value, and whether the defendant's use competes with the plaintiff's.

Hoffman argues that "the plaintiff should not obtain relief unless he earns money from the particular attributes appropriated by the defendant and identifies actual economic harm resulting from the appropriation." The burden of proof of economic harm should rest with the plaintiff.[145]

Concerning identifiable harm, one commentator noted: "Only when appropriation is substantial and will significantly diminish the value of a celebrity's publicity right can the plaintiff's property interest outweigh the First Amendment interest in free information and aesthetic expression."[146]

For example, Frank Sinatra might argue that Kitty Kelley's book would impair his ability to make money, since her book takes away from the market value of his. But how can Sinatra suffer economic harm if his book is not yet on the market? There is no harm because no competition yet exists.

At any rate, it seems likely that true Sinatra fans would buy both books. And considering the millions Sinatra already possesses, it appears that the profits from Kelley's book would constitute only a small percentage of those millions. "For the most part it is the Elvis Presleys, the Bela Lugosis, the Agatha Christies of the world who benefit from the right of publicity--and these are precisely the persons whose income would be more than adequate even if publicity rights were nonexistent."[147]

The use of a celebrity in entertainment vehicles should therefore be protected. "Films, novels, plays, and stage productions are traditional media for disseminating ideas and

realizing creative energies. Existence of a profit motive is irrelevant to the First Amendment value of these modes of informative and entertaining expression."[148]

In the past, decisions on publicity values have considered the merits of the expression involved. By emphasizing the actual harm done rather than the content and motive of the speech, it seems that the celebrity's interests should be protected. "In sum, concentrating on the potential harm to the plaintiff's right of publicity or the First Amendment value of the defendant's appropriation will often produce identical results."[149]

D. Protection Guideline

The third proposed guideline would allow anyone to claim a publicity value in their name or likeness, with that value to be determined by the level of notoriety attained (i.e., local, national, international). All creators should be encouraged to create, as the established public policy intends.

Consistent with the decision in the Cohn case, an individual will remain a public figure, as long as his life and exploits are of interest to the public. As long as the celebrity is not defamed in the work, and no showing of actual malice is made, expression should be protected.

Conclusion

Elizabeth Taylor may not appreciate the portrayal of her life in the mass media. However, even if an unwelcome portrayal is produced, she may still express her discontent and her side of the story through the news media. If the portrayal is libelous, she may sue. The proposed change in publicity rights will not prevent her from protecting her rights. It simply eliminates her ability to exercise prior restraint.

Frank Sinatra may wish to keep certain facts about his private life private. However, it seems that he gave up some aspect of his privacy when he sought 'public figure' status. Although he may dislike disclosure of certain aspects of his private life, it is the price he must pay to society for the public's contribution to his fame.

And that is the most important consideration of the proposed guidelines. For the first time, the role of the public in a celebrity's ascent to fame will be considered, as well the public's fascination with him or her. Coupled with the traditional public policy aims of encouraging creative activity, promoting fair trade practices, and encouraging the principled to enter public professions, it seems society's interests will generally be well served by the guidelines.

The right of publicity will be applied more consistently to literary works, films, and live performances since future decisions will be based on economic harm, rather than content of expression. And by eliminating the precedents set by the Zacchini and Harper & Row cases, journalists will not have to

worry about using the famous in newscasts, news reporting, or commentary. Unless news practices change dramatically, it appears highly unlikely that a news use will cause any real financial harm.

America's entertainers and other public figures are valuable natural resources worthy of protection. They provide joy, amusement and information for society's benefit, and often serve as an inspiration to other creative imaginations. But that protection should not restrict the rights or creative endeavors of others. So let us universalize the stars once again, for society's sake.

NOTES

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[25] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448(1976).

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